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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 340

JOHN O. MURRAY, PETITIONER

v.

BUSTER NED, A MINOR; LULEDA BAPTISTE, NEE NED; LEE BAPTISTE, HER HUSBAND; MOSES JOHNSON; STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION; AND THE HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, AND ASSIGNS, IMMEDIATE AND REMOTE, OF WILLIE TOM, DECEASED FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 927; AND FRANK NED, DECEASED FULL-BLOOD MISSISSIPPI CHOCTAW, ROLL NO. 264; AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the circuit court of appeals (R. 21–24) is reported in 135 F. (2d) 407.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered February 19, 1943 (R. 24). Petition for rehearing was denied March 24, 1943 (R. 26). A second petition for rehearing was denied June 12, 1943 (R. 30). The petition for a writ of certiorari was filed September 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 8 of the Act of January 27, 1933, c. 23, 47 Stat. 777, providing that "no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved" in a prescribed manner, reimposes restrictions upon land originally allotted subject to restrictions, which has been inherited by full-blood Choctaw Indians from an ancestor who purchased it prior to 1933 with county court approval and with unrestricted funds from full-blood heirs of the allottee.

STATUTE INVOLVED

Section 8 of the Act of January 27, 1933, c. 23, 47 Stat. 777, provides:

> That it shall be the duty of the attorneys provided for under the Act of May 27, 1908 (35 Stat. L. 312), to appear and represent any restricted member of the Five

Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court thereof, in any matter in which said restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any county court approving the sale of any interest in land, to the district court of the district to which the county is a part.

STATEMENT

On or about June 23, 1931, Willie Tom, a full-blood Mississippi Choctaw Indian, enrolled as such opposite Roll No. 927, died intestate while seized and possessed of certain allotted land (R. 3–4). This land descended to and became vested in his sole surviving heirs at law who were all full-blood Mississippi Choctaw Indians (R. 4–5).

On October 24, 1931, all the heirs of Willie Tom except one Moses Johnson conveyed their undivided interests in the land to Frank Ned, a full-blood Mississippi Choctaw Indian, Roll No. 264 (R. 5). The deed was duly approved by the County Court of Marshall County, Oklahoma, that court having jurisdiction of the settlement of the estate of the deceased allottee, Willie Tom (R. 5).

Frank Ned did not use restricted funds to purchase this undivided 15/16th interest, nor was the deed on a restricted form (R. 5).

Frank Ned died intestate on or about November 11, 1939, and his interest in the land descended to and became vested in his sole surviving heirs-at-law who were all full-blood Mississippi Choctaw Indians (R. 5–6).

On November 19, 1941, Bessie Pistubbee, one of the heirs of Frank Ned, conveyed by warranty deed her undivided 3/16th interest in the land to the petitioner, John O. Murray (R. 6). This deed was duly recorded, but was not approved by any county court or county judge in Oklahoma (R. 6).

On December 27, 1941, John O. Murray filed suit in the District Court of Marshall County, Oklahoma, seeking a judicial determination of the surviving heirs of Willie Tom and Frank Ned and asking that title be quieted and that the land be partitioned (R. 6–7). Notice of the pendency of the suit was served on the Superintendent of the Five Civilized Tribes. Pursuant to a motion of the United States, the cause was removed on February 16, 1942, to the United States District Court for the Eastern District of Oklahoma. (R. 7–8.) The United States then filed a complaint in intervention alleging that at the time of the execution and recording of the deed to the petitioner, John O. Murray, the land was restricted and inalienable and that the deed was

void because it was not approved by an Oklahoma county court (R. 7–8).

The district court concluded as a matter of law that the land was restricted and that the deed to the petitioner was void because not approved by a county court (R. 11–14). On June 30, 1942, the district court entered judgment to that effect and quieted title in Moses Johnson and the heirs of Frank Ned (R. 14–17).

The circuit court of appeals affirmed the judgment of the district court on February 19, 1943, and later denied two petitions for rehearing (R. 24, 26, 30).

ARGUMENT

1. Petitioner contends (Pet. 3–12) that Section 8 of the act of January 27, 1933 (*supra*, pp. 2–3) was never intended to reimpose restrictions but merely to provide a procedural change in the method of approving conveyances by full-blood Indian heirs. However, Congress has the constitutional power to reimpose restrictions on land which has become freed of restrictions. *McCurdy* v. *United States*, 246 U. S. 263; *Brader* v. *James*, 246 U. S. 88; *Tiger* v. *Western Investment Co.*, 221 U. S. 286. Prior to the instant decision, and in view of the broad, unlimited language of Section 8 as well as the purpose of the legislation as disclosed by the letter (R. 23) of the Secretary of the Interior recommending its passage (H. Rep. No. 1015, 72d Cong., 1st sess., p. 2; S. Rep.

873, 72d Cong., 1st sess., p. 3), the court below had twice decided that Section 8 does reimpose restrictions, thus evidencing that it accomplishes more than a mere procedural change in pre-existing legislation. *Whitchurch* v. *Crawford,* 92 F. (2d) 249; *McCurtain* v. *Palmer,* 121 F. (2d) 1009. The passages from the congressional hearings (S. Subcommittee on Indian Affairs, H. R. 8750, 72d Cong., 1st sess.) upon which petitioner relies (Pet. 7–10), required no different construction, because they related only to the nature of the restrictions, not to their coverage. Likewise, the opinion of the Solicitor of the Department of the Interior of March 14, 1934 (54 Interior Decisions 382), upon which petitioner also relies (Pet. 6, 10), was not to the contrary, because it merely held that Section 8 was not retroactive. The *Whitchurch* case involved a remote inheritance of allotted land from an allottee, while the *McCurtain* case concerned a direct inheritance from an allottee of land purchased with restricted funds. The present case presented simply the question whether Section 8, which had already been construed as reimposing restrictions, applied to an inheritance of allotted land from one who was not the allottee. Because Section 8 unqualifiedly applies to "any full-blood Indian heir," and thus differs materially from the earlier Act of May 27, 1908, as amended April 12, 1926, c. 115, 44 Stat. 239, which deals with conveyances by full-blood Indians of

lands "acquired by inheritance or devise from an allottee of such lands," an affirmative answer was plainly required, particularly as Congress would have referred to prior legislation and also made provision for devisees as well as heirs of the allottee had it intended no substantial change in existing legislation.

2. Petitioner's view (Pet. 3–5, 12) of the effect of the decision below upon the security of titles in Oklahoma and other states has no merit. Since Section 8 clearly reimposes restrictions on allotted lands inherited by full-blood Indian heirs from one who is not an allottee, it is not material what effect a decision so holding has upon the security of titles. In the absence of evidence that Congress was concerned more with the security of titles than with the reimposition of restrictions, the reimposition of the restrictions must be given effect. Furthermore, purchasers of Oklahoma land cannot rely upon the record evidence alone to determine whether or not land is restricted; they must also take into account the decisions construing legislation dealing with the Five Tribes. Consequently, the fact that the instant case was decided one way rather than another adds little to their title problems in this respect. Also, since the decision below applies only to allotted land, or as in the *McCurtain* case (121 F. (2d) 1009 (C. C. A. 10)) to land purchased on a restricted form of deed, such purchasers will have the same clue

which they must rely on under other decisions construing Indian legislation to determine whether the land "was owned by ancestors of Indian blood and that the heirs are full-blood Indians" (Pet. 3).[1]

CONCLUSION

The decision below is correct and involves no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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October 1943.

[1] Moreover, neither the instant decision nor the decisions in *Whitchurch* v. *Crawford*, 82 F. (2d) 249 (C. C. A. 10), and *McCurtain* v. *Palmer*, 121 F. (2d) 1009 (C. C. A. 10), concern other than Oklahoma land. And the terms of Section 8 calling for approval of conveyances by the probate courts of Oklahoma establish that the legislation applies only to Oklahoma land. Consequently, the decision below can have no effect upon the security of titles to lands in other states.

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